

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On February 11, 2008 appellant, then a 51-year-old administrative assistant, filed an occupational disease claim (Form CA-2) alleging that she developed constant pain in both elbows, both hands, both arms, neck, and back due to factors of her federal employment, including the use of a computer and holding her telephone. In an April 3, 2008 decision, OWCP accepted her claim for bilateral lateral epicondylitis, bilateral medial epicondylitis, sciatica, and neck sprain.⁵ On June 10, 2009 it subsequently expanded acceptance of the claim to include bilateral carpal tunnel syndrome. OWCP paid wage-loss compensation on the periodic rolls, effective June 7, 2009.

On December 5, 2014 OWCP mailed appellant an EN1032 form for her completion. The form instructed her to report all self-employment activities or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, including a store or a restaurant, and providing services in exchange for money, goods, or other services. The kinds of services that she was required to report included such activities as carpentry, mechanical work, painting, contracting, childcare, keeping books and records, and managing and overseeing a business of any kind, including a family business. The form also instructed appellant to report any work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to another.

The cover letter for the EN1032 form included the following warning: "A false or evasive answer to any question, or the omission of an answer, may be grounds for forfeiting your compensation benefits and subject you to civil liability." The forms contained certification clauses, which informed appellant of the consequences of not accurately reporting her employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation benefits.

On December 27, 2014 appellant completed and signed the EN1032 form. In response to the question of whether appellant worked for an employer for the past 15 months, she responded

⁴ Docket No. 17-1362 (issued March 13, 2018).

⁵ Under OWCP File No. xxxxxx455, OWCP accepted appellant's September 15, 2008 occupational disease claim for left knee sprain, left knee arthropathy, left knee internal derangements, bilateral pes planus, neck sprain, bilateral shoulder sprain, bilateral upper arm sprain, bilateral brachial plexus lesions, bilateral plantar fibromatosis, and bilateral tarsal tunnel syndrome as causally related to her employment duties. On September 1, 2010 it administratively combined the current case under OWCP File No. xxxxxx045 with OWCP File No. xxxxxx455, with the latter file as the master file.

“No.” In response to the question of whether she was self-employed or involved in any business enterprise in the past 15 months, appellant again responded “No.”

On June 12, 2015 OWCP received a narrative statement from appellant. Appellant indicated that she needed to correct an answer on the yearly paperwork form. She explained that her husband had purchased a snow cone trailer and had added her name to the permits, trailer, and LLC. Appellant reported that she answered “No” on the EN1032 form and that she did not think about the snow cone trailer until her husband opened it for business over the summer.

In a July 23, 2015 letter, the employing establishment’s Office of Inspector General (OIG) informed OWCP that an investigation into appellant revealed that she had been operating her own business and had failed to report the employment activities to OWCP. It requested that OWCP issue a forfeiture decision due to appellant’s failure to disclose her employment.

On July 27, 2015 OWCP received an OIG summary report of investigation, which described surveillance conducted by OIG agents and included photographs and video surveillance of appellant running errands and working at a snow cone business. It also contained documents from the state of Oklahoma establishing HARCO Production and T.T.’s Hawaiian Snow as LLCs. Appellant is listed as the registered agent for both companies. The report further indicated that during an interview, with appellant on May 21, 2015, she acknowledged that she was currently operating a snow cone business with her husband.

In a completed Form EN1032 dated February 7, 2016, appellant responded “Yes” that she was self-employed or involved in a business enterprise from the period April 1 through September 1, 2015. She explained that she and her husband bought a snow cone stand and noted a pay rate of \$8.00/hour.

By decision dated August 18, 2016, OWCP found that appellant had forfeited her wage-loss compensation for the period September 27, 2013 through December 27, 2014 for failure to report her business and employment activities or earnings on a Form EN1032.⁶

By separate decision dated August 18, 2016, OWCP also issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$43,832.60 for the period September 27, 2013 through December 27, 2014 as a result of the forfeiture. It found that she was at fault in the creation of the overpayment.

OWCP received a September 21, 2016 letter by Dr. John Ellis, Board-certified in family medicine, who related that appellant had severe anxiety and depression due to the multiple work-related injuries. Dr. Ellis noted that appellant was under the influence of narcotic pain medicine when she filled out the Form EN1032 in 2014 and opined that appellant was not fully aware of what she was signing.

In an October 18, 2016 report, Dr. Gary A. Rouse, a clinical psychologist, related that, since his original evaluation in September 2008, appellant had declined emotionally and

⁶ The forfeiture period covered the 15 months preceding the December 27, 2014 EN1032 form.

physically. He opined that appellant was not competent or knowledgeable enough to understand what she was signing or to understand the legal implications of partnerships and LLCs.

By decision dated December 12, 2016, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$43,832.60 for the period September 27, 2013 through December 27, 2014. It also found that appellant was at fault in the creation of the overpayment and, therefore, was not eligible for waiver of recovery of the overpayment.

In a January 31, 2017 statement, appellant explained that she did not receive any money from her husband's snow cone business nor did she perform any job activities. She reported that her husband had recently dissolved the LLC.

On June 2, 2017 appellant appealed the December 12, 2016 overpayment decision to the Board.

On August 18, 2017 appellant requested reconsideration of the August 18, 2016 forfeiture decision. In a statement dated August 9, 2017, she asserted that she believed that she was not required to report her investment income as work activities since there was no evidence that the three to five hours total spent at the business could be construed as integral to the operation of the business. Appellant cited to Federal (FECA) Procedure Manual Chapter 2.402.5 and *S.G.*⁷ And contended that the Board has distinguished between the reporting requirements for income received from passive investment and earnings and income received by performing work and earning wages. Appellant also alleged that that she was not fully aware when she signed the LLC documents due to her deteriorating mental health, severe anxiety, and depression. She also cited to *B.Y.*,⁸ and alleged that the Board had previously held that, in finding that a claimant forfeited compensation, OWCP could not rely solely on video tape and summary submitted by the employing establishment's OIG. Appellant also noted her disagreement with the OIG investigation and her interview with the OIG agents.

By decision dated November 17, 2017, OWCP denied modification of the August 18, 2016 forfeiture decision.

By decision dated March 13, 2018, the Board affirmed the December 12, 2016 OWCP decision, finding that OWCP properly determined that appellant had forfeited her right to compensation for the period September 27, 2013 through December 27, 2014; that an overpayment of compensation in the amount of \$43,832.60 was created as a result of the forfeiture; that she was at fault in the creation of the overpayment; and that OWCP properly required recovery of the overpayment by deducting \$250.00 from appellant's continuing compensation payments.

On November 20, 2018 appellant requested reconsideration. In a narrative statement, she alleged that OWCP ignored many issues. She indicated that OWCP ignored evidence and arguments concerning why the OIG interviews or photographs were applicable and whether her

⁷ Docket No. 11-0942 (issued April 4, 2012).

⁸ Docket No. 11-1798 (issued July 24, 2012).

comprehension was impaired. Appellant cited to *C.G.*,⁹ and alleged that she had provided probative supporting evidence that she would have difficulty understanding the obligations required on a Form EN1032.

OWCP received a statement from appellant dated June 1, 2017. Appellant alleged that OWCP did not support its forfeiture determination because there was no evidence establishing that she knowingly failed to report self-employment or earnings on the Form EN1032 signed on December 27, 2014. She explained that the few hours that she spent at the business could not be construed as integral to the operation of the business. Appellant also asserted that, although the business was licensed in May 2014, it did not open its doors for business until April 2015. She further indicated that the file contained statements from her psychologist, who noted that she was not fully aware of what she was signing when she signed the LLC.

By decision dated December 3, 2018, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA¹⁰ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.¹¹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹²

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹³ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁴ If the request is timely but fails to meet at least one of the

⁹ Docket No. 11-0454 (issued May 22, 2012).

¹⁰ *Supra* note 3.

¹¹ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹² 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹³ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

¹⁴ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has appellant advanced a relevant legal argument not previously considered by OWCP. In support of her November 20, 2018 request for reconsideration, she submitted a statement alleging that OWCP ignored her arguments and evidence concerning why the OIG interviews and photographs were not applicable and whether her comprehension was impaired. In a June 1, 2017 statement, appellant argued that OWCP improperly determined that she knowingly gave a false answer on the EN-1032 form since the few hours that she spent at the business could not be construed as integral to the operation of the business. Her reconsideration request does not advance a new legal argument not previously considered nor show that OWCP erroneously applied or interpreted a specific point of law. The Board finds that the argument proffered by appellant on reconsideration was cumulative, duplicative, or repetitive in nature and were previously addressed in the November 17, 2017 OWCP decision and March 13, 2018 Board decision. Accordingly, her reconsideration request was insufficient to warrant reopening the claim for merit review.¹⁶ Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁷

Furthermore, the Board finds that appellant submitted no new evidence in support of her request for reconsideration.¹⁸ Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).¹⁹

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁰

¹⁵ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁶ *J.V.*, Docket No. 19-1554 (issued October 9, 2020); *see T.B.*, Docket No. 16-1130 (issued September 11, 2017).

¹⁷ *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁸ *See F.D.*, Docket No. 19-0890 (issued November 8, 2019).

¹⁹ *T.M.*, Docket No. 19-0535 (issued July 25, 2019).

²⁰ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board